

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 5, 2007 Session

THOMAS WALTER ROWE v. ROBERTA ANN HOSEY ROWE

**Appeal from the Chancery Court for Union County
No. 3435 Conrad E. Troutman, Jr., Judge, by Interchange**

No. E2005-01023-COA-R3-CV - FILED FEBRUARY 22, 2007

This appeal involves the Trial Court's pre-trial award of temporary alimony to Wife and the property distribution following trial. Thomas Walter Rowe ("Husband") and Roberta Ann Hosey Rowe ("Wife") were married in 1996, and were divorced a few years later. While the divorce was pending and following a hearing, the Trial Court ordered Husband to pay temporary alimony pending a final decision in the divorce proceedings. Following the trial, the Trial Court first classified the property and then divided the marital property. Husband appeals challenging the award of temporary alimony as well as the property division. We affirm the judgment of the Trial Court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the
Chancery Court Affirmed; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

David B. Hamilton and Christopher Rowe, Knoxville, Tennessee, for the Appellant, Thomas Walter Rowe.

J. Elaine Burke, Knoxville, Tennessee, for the Appellee, Roberta Ann Hosey Rowe.

OPINION

Background

Husband and Wife were married in December of 1996. Approximately nineteen months later, Husband filed a complaint for divorce claiming Wife was guilty of inappropriate marital conduct or, in the alternative, that irreconcilable difference had arisen between the parties. An Order of Reconciliation was entered two months later. Sadly, the reconciliation did not last and the divorce proceedings were reinstated less than two years after they were suspended. Wife then answered the complaint, generally denying the pertinent allegations. Wife did, however, admit that irreconcilable differences had arisen between the parties. Wife also filed a counterclaim asserting, alternatively, that Husband was guilty of inappropriate marital conduct.

In January of 2001, the Trial Court entered an order awarding Wife temporary alimony of \$1,200 per month pending the final hearing in the divorce proceedings. The Trial Court also ordered as temporary alimony that Husband make the lease payments and insurance payments on Wife's vehicle. In its order, the Trial Court specifically stated that the order was premised on "testimony of the parties, the parties' prior year's tax returns which were received as exhibits, the arguments of counsel, and the record as a whole." There is no transcript from this hearing or a statement of the evidence in the record on appeal.

Following a hearing in December of 2002, the Trial Court entered an order declaring the parties divorced pursuant to Tenn. Code Ann. § 36-4-129.¹ The Trial Court ordered the parties to mediate all issues pertaining to "alimony in futuro," the property distribution, and attorney fees. The Trial Court also ordered Husband to continue paying temporary alimony of \$1,200 per month plus Wife's lease and insurance payments on her vehicle through May 31, 2003, by which time Wife was to have completed a Master's Degree program at the University of Tennessee.

The parties were unable to reach a mediated settlement agreement regarding the property distribution or alimony. Accordingly, a trial was held. As with the hearing on temporary alimony, there is no transcript from the trial or a statement of the evidence in the record on appeal. Following the trial, the Trial Court entered an order resolving the remaining issues, in pertinent part, as follows:

At the time of the parties' marriage, [Husband] owned a home in Union County, Tennessee. The home was purchased for \$86,500.00 in 1993. During the marriage ... the parties made improvements to said home and in 2003 it was sold for \$119,000.00. The Court finds that the parties' residence did increase in value

¹ Tenn. Code Ann. § 36-4-129 (2005) authorizes a trial court, upon stipulation, to "declare the parties to be divorced, rather than awarding a divorce to either party alone."

during the brief period of the marriage due in part to improvements made by the parties in that time period.

The Husband had an extensive and valuable gun collection prior to the parties' marriage. The Husband's business required him to travel and appear at gun shows where he traded and appraised antique guns and collections. He also bought, sold, and traded in antique guns and gun accessories. The Wife testified that she traveled with him during the marriage and helped Husband in this business and helped him author and produce several books on antique guns that he sold; this testimony was disputed by the Husband....

The Wife claims an interest in the 1999 Ford van, several small bank accounts, Rowe Publications, Tom Rowe Books, and the parties' 2000 federal income tax refund....

A 1978 Valiant 40-foot sailboat was purchased in the fall of 1999 and extensive repairs were made to and on the boat. The source of funds to purchase the boat are at issue. The Husband contended that he sold two guns from his collection which he used to purchase the boat and do repairs on the boat. The Wife contended that the funds came from the sale of the gun books she helped him prepare and sell. She further testified that she assisted Husband in getting the boat in usable condition, this testimony was disputed by the Husband.

The Court FINDS and ORDERS the following:

That the value of Wife's interest in the marital home sale is \$14,500.00....

That the Wife's equity in the 1999 Ford van is set at \$3,500.00....

That the Husband is awarded sole title and possession of the 1992 Oldsmobile 88 and Husband's new 2002 vehicle, and Wife is entitled to no equity from them.

That as to the 1978 sailboat bought in the fall of 1999, the Court accepts Husband's position that this purchase was made with funds from guns sold that were owned prior to the parties' marriage. Extensive repairs were made to the boat after the purchase and most of this was paid with a draw on [the] marital residence's equity loan. The Wife assisted in helping with the cleaning of the boat and

assisted with the repairs, but gave no monetary assistance. The Court sets the value of her interest in the sailboat at \$5,000.00....

That the Wife's interest in the cash, Golden Medical Savings and the parties' IRS 2000 tax return is set at \$1,874.00....

That as to Wife's interest in Rowe Publications and Tom Rowe Books, the Court is of the opinion that this was an on-going business that the Husband had prior to the marriage and through his expertise in the field he was in. The Court sets the Wife's marital interest in this venture at \$5,000....

That during the early part of this litigation, the Wife incurred legal expenses in court appearances and contempt hearings in order to get temporary alimony and enforcement of the same. The Court orders that \$15,000.00 in attorney fees be paid to Wife's attorney. Other than this, each party shall be responsible for their own attorney fees....

That each party is vested with the marital personal property that is in their possession as their sole and separate property except as otherwise set forth herein....

That as to the Wife's contention regarding the value of the guns bought during the terms of the marriage, the Court has to take into consideration that some guns were sold that were owned prior to the parties' marriage. The Court sets the value of the Wife's interest in the guns, powder cans, antique shooting medals, etc. at ... \$8,500.00....

That the Husband is awarded the antique shooting range picture, the King Chains, Cartridge boards and the Steins. Wife is awarded her family silver in the Husband's possession. The parties shall arrange to simultaneously exchange these items.

That the Husband's unpaid temporary alimony is found to be \$1,900.00 unless the Husband immediately provides proof of payment of this judgment after [entry of] the November 28, 2001 [order]....

That no permanent alimony is appropriate to be granted to either party.

After the Trial Court's judgment was entered, Husband filed a motion for new trial or to make additional findings of fact. In this motion, Husband requested, among other things, for the Trial Court to "treat all temporary alimony paid to [Wife] as a transfer of marital asset[s] due to the amount of alimony paid in relation to the value of the estate granted to [Wife]...."

The Trial Court resolved Husband's motion for new trial or to make additional findings of fact stating:

That there is no current Tennessee case law to support [Husband's] position to treat his temporary alimony payments ... as property settlement. The Court notes that there is even a dispute as to whether the issue of temporary alimony was properly raised at the final hearing as the issue of temporary or rehabilitative alimony was dealt with at the parties' December 12, 2002 hearing and no appeal was filed. As the December 12, 2002 Order reserved only the issue of alimony in futuro, the Court did not believe that any issues regarding temporary support were before him at the September 25, 2003 hearing. Therefore, [Husband's] Motion For a New Trial or To Make Additional Findings of Fact is denied.

Husband appeals raising five issues, which we quote verbatim from his brief:

- A. Whether the Trial Court abused its discretion in denying [Husband's] Motion For a New Trial or To Make Additional Findings of Fact on the matter of Temporary Alimony as Property Settlement.
- B. Whether the Trial Court abused its discretion by failing to find the temporary alimony paid by [Husband] to [Wife] to be excessive in both amount and duration sufficient to affect the final division of property.
- C. Whether the Trial Court abused its discretion by failing to consider the temporary alimony in its determination of the division of marital property.
- D. Whether the Trial Court abused its discretion in the division of property.
- E. Whether the Trial Court abused its discretion as to the determination of Marital and Premarital property.

Discussion

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted “under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts.” *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

Regarding an award of alimony, Tennessee courts have stated on numerous occasions that a trial court has broad discretion in determining the type, amount and duration of alimony, depending on the particular facts of each case. *See, e.g., Wood v. Wood*, No. M2003-00193-COA-R3-CV, 2004 WL 3008875 at *4, (Tenn. Ct. App. Dec. 28, 2004), *app. denied June 27, 2005* (citing, *inter alia, Burlaw v. Burlaw*, 40 S.W.3d 465, 470 (Tenn. 2001) and *Sullivan v. Sullivan*, 107 S.W.3d 507, 511 (Tenn. Ct. App. 2002)). Appellate courts are disinclined to second guess a trial court’s decision regarding alimony unless it is not supported by the evidence or is contrary to public policies reflected in the applicable statutes. *Nelson v. Nelson*, 106 S.W.3d 20, 23 (Tenn. Ct. App. 2002).

Tenn. Code Ann. § 36-5-121(b) authorizes a trial court to make an award of temporary alimony, also known as alimony *pendente lite*. This statute provides as follows:

The court may, in its discretion, at any time pending the final hearing, upon motion and after notice and hearing, make any order that may be proper to compel a spouse to pay any sums necessary for the support and maintenance of the other spouse, to enable such spouse to prosecute or defend the suit of the parties and to make other orders as it deems appropriate. Further, the court may award such sum as may be necessary to enable a spouse to pay the expenses of job training and education. In making any order under this subsection (b), the court shall consider the financial needs of each spouse and the financial ability of each spouse to meet those needs and to prosecute or defend the suit.

Tenn. Code Ann. § 36-5-121(b) (2005) (previously codified at Tenn. Code Ann. § 36-5-101(l)).

Husband attacks the award of temporary alimony on several fronts. In summary, Husband claims the amount and duration of the temporary alimony was excessive and, that being the case, he should get a credit against the property distribution for the amount of temporary alimony that was excessive. What Husband is asking us to do, however, is to back-track with the award of temporary alimony and compare and contrast its reasonableness with events that happened after the temporary alimony ended. In other words, Husband is arguing that based on the way the Trial Court distributed the marital property etc., following the trial on September 25, 2003, the award of

temporary alimony which initially was made on January of 2001 and which continued through May of 2003 was improper. We must look to Tenn. Code Ann. § 36-5-121(b) (2005) to determine if the award of temporary alimony was proper.

An award of alimony is factually driven. Our ability to address Husband's challenges to the Trial Court's factual findings as to the propriety of the temporary alimony award is severely hampered if not eliminated by the absence of transcripts of the hearing or the trial, or any statement of the evidence prepared in accordance with Tenn. R. App. P. 24 (c). "This court cannot review the facts *de novo* without an appellate record containing the facts, and therefore, we must assume that the record, had it been preserved, would have contained sufficient evidence to support the trial court's factual findings." *Sherrod v. Wix*, 849 S.W.2d 780, 783 (Tenn. Ct. App. 1992). Accordingly, the amount and duration of the temporary alimony awarded is affirmed.

Husband's remaining arguments all center around the division of marital property following the trial. Much of Husband's argument surrounding the division of marital property is tied into his previous argument surrounding the award of temporary alimony. Husband also argues that the marital property distribution was inequitable and the Trial Court erred when it awarded Wife any interest at all in his various businesses.

A division of marital property or a determination of what is marital versus separate property, or whether there had been an increase in value to separate property based on the contributions of the other spouse are all factually driven. Without a transcript of the trial or statement of the evidence, we cannot review the facts *de novo* relevant to the division of marital property. The Trial Court's order contains numerous findings relevant to the division of the marital property. At oral argument, Husband's counsel stated that there was a court reporter present at the trial, but the tape recording of the trial was destroyed while in the possession of the court reporter, albeit through no fault of the court reporter. We acknowledge that the lack of a transcript is through no fault of Husband or his counsel. However, this in no way alters the need for the transcript or a statement of the evidence in order for this Court to undertake an appropriate review of the Trial Court's factual findings.

Husband argues that we can rely on the facts that are present in the record when conducting our appellate review. We would agree with Husband if there was some way for us to determine that the facts that are contained in the record are all of the evidence that was presented to the Trial Court at trial. Unfortunately, there is nothing in the record that enables us to make that determination. This being so, we "assume that the record, had it been preserved, would have contained sufficient evidence to support the trial court's factual findings." *Id.* Therefore, we have no alternative but to affirm the Trial Court's classification of certain property as marital or separate property as well as its distribution of the marital property.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. Costs on appeal are taxed to the Appellant, Thomas Walter Rowe, and his surety.

D. MICHAEL SWINEY, JUDGE